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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 10

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT WITH GERTRUDE FELDMAN JAMES, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1935

CERTIORARI GRANTED APRIL 29, 1935

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	3	1
Exhibit A—Agreement creating trust, Feb. 21, 1930	8	3
Exhibit B—Letter from Commissioner, April 7, 1933	17	8
Answer	21	10
Stipulation as to facts	23	10
Affidavit of P. A. Miller	26	11
Opinion, Smith, M	27	12
Decision	34	15
Petition for review and assignments of error	35	16
Notice of filing petition for review	41	18
Praecipe for record	43	19
Clerk's certificate [omitted in printing]	45	19
Proceedings in U. S. C. C. A., Second Circuit	46	19
Stipulation and addition to record	46	19
Schedule A—List of property	47	20
Opinion, Manton, J	50	22
Dissenting opinion, Hand, J	54	27
Judgment	56	29
Clerk's certificate [omitted in printing]	58	30
Order allowing certiorari	59	30

1 Before the United States Board of Tax Appeals

Docket No. 72522

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN Agreement with Gertrude Feldman James, deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Entries.

Appearances:
For Petitioner: Edw. M. Cameron, Jr., Esq.
For Respondent: L. S. Pendleton, Esq.

1933
June 6—Petition received and filed. Taxpayer notified. (Fee paid.)
June 6—Copy of petition served on General Counsel.
July 19—Answer filed by General Counsel.
July 24—Copy of answer served on taxpayer.
Aug. 28—Hearing set October 19, 1933.
Oct. 17—Stipulation of facts with affidavit attached filed.
Oct. 19—Hearing had before Mr. Smith, Division 5, on the merits. Submitted. Stipulation of facts filed heretofore. Briefs due in 30 days.
2 Oct. 24—Transcript of hearing of October 19, 1933 filed.
Nov. 20—Brief filed by taxpayer.
Nov. 21—Order that parties be granted an extension to November 21, 1933 to file briefs entered.

1934
Feb. 21—Opinion rendered—Mr. Smith [illegible]vision 5. Judgment will be entered for petitione
Feb. 27—Decision entered—Division 5, M.. Smith.
May 7—Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.
May 15—Proof of service filed by General Counsel.
June 27—Praecipe with proof of service thereon filed by General Counsel.
July 6—Order enlarging time to 8/15/34 for transmission and delivery of record entered.

Before United States Board of Tax Appeals

[Title omitted.]

3 *Petition*

The above-named petitioner, City Bank Farmers Trust Company, as trustee under a trust agreement with Gertrude Feldman James, deceased, dated February 21, 1930, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing date April 7, 1933,

and bearing the symbols MT-ET-C1-NR-26147-SEM, and as a basis for its proceedings alleges upon information and belief as follows:

1. Your petitioner, City Bank Farmers Trust Company, a corporation duly organized and existing under the laws of the State of New York, has its principal place of business at No. 22 William Street, in the Borough of Manhattan, city, county, and State of New York.

4 The said Gertrude Feldman James died on or about the 20th of May 1931. At the time of her death she was a nonresident alien of the United States, being a resident and subject of the Kingdom of Great Britain. On February 21, 1930, she created a trust with City Bank Farmers Trust Company, as trustee, a copy of which agreement creating said trust is hereto annexed and marked "Exhibit A."

2. The notice of deficiency, a copy of which is hereto annexed and marked "Exhibit B", was mailed to said City Bank Farmers Trust Company on April 7, 1933.

3. The tax in controversy is the Federal estate tax upon the estate of said decedent and is in the amount of $11,840.03.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors, to wit:

The Commissioner of Internal Revenue has erroneously determined that certain securities held by the petitioner as principal of the said trust and over which the decedent had no control or power of disposition at the time of her death, should be included as part of the gross estate of this decedent.

5. The facts upon which petitioner relies as a basis of this proceeding are as follows:

(a) In due course and seasonable time, the petitioner as
5 trustee as aforesaid, duly filed with the said Commissioner of Internal Revenue through the collector of internal revenue for the second district of New York, a return of the property held by said trustee as provided for by the Revenue Act of 1926, upon the form provided for such purpose by the United States Commissioner of Internal Revenue and the United States Treasury Department.

Thereafter, the said return filed as aforesaid was audited by the Commissioner through his proper representative, and the said petitioner notified of the result of such audit and report by letter bearing date October 22, 1932, signed by J. R. Baradel, internal revenue agent in charge. Upon a protest being filed by the said trustee to the said report, the Commissioner of Internal Revenue considered said protest and considered the said letter of J. R. Baradel as aforesaid, and reaudited the said return filed as aforesaid and determined a tentative deficiency tax as aforesaid in the sum of $11,840.03, and advised petitioner thereof by letter bearing date April 7, 1933, signed by R. M. Estes, deputy commissioner, being the letter herein-

before in paragraph numbered 2 hereof mentioned, a copy whereof is hereto annexed and marked "Exhibit B" as aforesaid.

(b) As hereinabove stated, the said Gertrude Feldman James died on or about the 20th day of May, 1931. On February 21, 1930, she created a trust with City Bank Farmers Trust Company as trustee.

(c) By paragraph 12 of the agreement creating said trust,
6 the decedent has a conditional right to modify, alter, or revoke the same, this right, however, being expressly conditioned upon the consent in writing of the trustee and of Samuel James, decedent's husband, during his life, and after his death, upon the consent in writing of the trustee and the settlor's brother-in-law.

(d) The said Samuel James, whose written consent it was necessary to obtain in order to effect a revocation of the trust, was entitled under the terms of the said trust agreement to the income of the trust after the death of the said Gertrude Feldman James, and was therefore a person having an interest in the said trust adverse to that of the said Gertrude Feldman James, the settlor thereof.

(e) Section 302 (d) of the Revenue Act of 1926 has no application to trusts where the power to revoke or alter is dependent upon the consent of one having an adverse interest in the trust.

(e) Said section 302 (d) of the Revenue Act of 1926, insofar as it is intended to apply to a trust where the power to revoke or alter, is dependent on the consent of one having an adverse interest therein, is unconstitutional in the following and other respects:

(1) In that it is an arbitrary and capricious taking of propery without due process of law, in violation of the fifth amendment of the Constitution of the United States.

(2) In that it is the taking of private property for public
7 use without just compensation, in violation of the said fifth amendment.

(3) In that Congress has no power to impose a Federal estate tax based upon property not owned by decedent and over which the decedent had no control at the time of his death.

Wherefore, petitioner prays that this Board may hear the proceeding and render judgment in accordance with the foregoing.

EDWARD M. CAMERON, Jr.
CHARLES W. RIVOIRE,
Counsel for Petitioner,
Office and P. O. Address, 20 Exchange Place, New York, N. Y.

TAYLOR, BLANC, CAPRON & MARSH,
Of Counsel,
20 Exchange Place, New York, N. Y.

[*Duly sworn to by P. A. Miller, jurat omitted in printing.*]

8 *Exhibit A, to foregoing petition*

This agreement, made, executed and delivered in the city of New York, the 21st day of February, 1930, by and between Gertrude

Feldman James (hereafter called "the Settlor") and the City Bank Farmers Trust Company (hereafter called "the Trustee"). Witnesseth,

The Settlor hereby assigns, transfers, conveys and sets over unto the City Bank Farmers Trust Company as trustee, the property described in schedule A hereof, to be held by said Trustee in trust for the uses and purposes herein set forth.

1. To hold, invest, reinvest and keep the said trust property
9 invested during the lives of Vera Nanette James, daughter of the Settlor and of Samuel James, husband of the Settlor, and Peggy Florence James, daughter of the Settlor and of the said Samuel James, that is, until the death of the survivor of the said Vera Nanette James and Peggy Florence James, said period being hereinafter designated as the "trust period"; to collect the rents, issues, and profits thereof and to apply in the income from said trust property to and for the use of the Settlor until her death or until the termination of the trust period, whichever event shall first occur, and upon and after the death of the Settlor prior to the termination of the trust period, to hold the said trust property and apply the income thereof as follows:

A. To apply the income thereof to the use of the said Samuel James, husband of the Settlor, if then living, until his death or until the termination of the trust period, whichever event shall first occur, or, if not then living, or upon his death prior to the termination of the trust period, to divide the principal into so many equal shares that there shall be one for each child of the Settlor and of the said Samuel James then living and one for the descendants then living of a deceased child of the Settlor and of the said Samuel James and to dispose of the income and principal of said shares as follows:

(a) To apply the income of each share held for a child of the Settlor and of the said Samuel James to the use of such child
10 until his or her death or until the termination of the trust period, whichever event shall first occur, and upon his or her death prior to the termination of the Trust period, to pay over the principal of such share to such child's descendants and in such proportions as such child may have appointed by will and to pay over any part not effectively so appointed in equal parts per stirpes to his or her descendants then living or if none, in equal parts per stirpes to the surviving children of the Settlor and of the said Samuel James and the descendants then living of a deceased child of the Settlor and of the said Samuel James or, if none be then living, to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

(b) To pay over the principal of a share set apart for the descendants of a deceased child, in equal parts per stirpes, to such descendants.

B. Upon the termination of the trust period, to pay over the principal of the trust fund to the said Samuel James, if then living, or if not, to the Settlor, if then living, or if not, to such beneficiaries as shall then be receiving income according to the provisions of paragraph 1. A. (a) hereof, and in the same proportions as provided therein for the distribution of income, or if no such beneficiar be then living, then to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

11 2. Income shall be applied in as nearly equal quarterly instalments as is practicable.

3. The Trustee may from time to time apply to the use of the Settlor's said husband and descendants or any of them, so much of the principal of the trust as in its discretion it may deem advisable for their proper education, care, comfort, support, or advancement in life.

4. The Trustee shall defer delivery of principal payable to a minor until the minor comes of age, but in its discretion may apply to his or her use so much of such principal or of the income thereof as it may deem advisable. The Trustee may make payment of income or principal applicable to the use of a minor to the minor's parent or guardian, or to the minor or by expending it for his or her benefit; and may accumulate for the minor's benefit so much of such income as it may deem unnecessary for his or her proper education, maintenance, and support.

5. No assignment or order by any beneficiary by way of anticipation of any part of the income of the trust herein created shall be valid, but the income shall be paid by the Trustee direct to the person entitled to receive it without power of anticipation or deposited to the beneficiary's account in som bank of good standing and repute without regard to any assignment or order; nor can the principal or income of said trust become attached by Trustee process or garnishment or other legal proceedings while in the hands

12 of the Trustee, except to the extent permitted by the laws of New York.

6. Upon the termination of any estate hereunder accrued income shall belong to the next estate. The Trustee may hold the trust corpus in one or more consolidated funds in which separate shares shall have undivided interests. The Trustee without increase or decrease of liability, may register stocks or bonds in the name of its nominee without describing the trust or may hold the same in bearer form. The Trustee shall not amortize premiums paid for trust securities nor take any account of discounts; stock dividends shall be considered as principal; commissions of the Trustee, whether on income or principal, other than termination charges shall be a first charge against income; in other respects the Trustee's determination shall be conclusive as to whether any payment received or charge incurred shall be credited to or charged against income or principal.

7. Any judgment rendered for or against the Trustee by any court having competent jurisdiction, in any action affecting this trust agreement or based on the existence thereof shall be conclusive and binding on all parties interested directly or contingently, beneficially or otherwise, under the terms of this agreement and any payment or payments made by the Trustee pursuant to the terms of any such judgment shall operate as a full release and discharge to the Trustee for the amount of any such payment or payments and all expenses incidental thereto.

13 8. The Trustee may at any time resign as trustee hereunder by an instrument in writing executed by it provided that it shall send notice of such resignation by registered letter addressed to the Settlor, or if she it not then living, to such of the beneficiaries then entitled to income hereunder as shall have then attained the age of twenty-one (21) years at her or their last address of which the Trustee shall have been advised. The resignation of the Trustee shall take effect at the time specified in such notice, but no sooner than forty days after the mailing of such registered letter unless theretofore accepted by the Settlor or if she is not then living, by a majority of the said beneficiaries. In the event of such resignation, the Settlor, or if she is not then living, a majority of the said beneficiaries may, by an instrument in writing executed by her or them and delivered to the Trustee appoint a successor trustee or trustees hereunder.

9. Should any married woman be a beneficiary hereunder, whether of income or principal, the Trustee may accept her sole and separate receipt as though she were unmarried, for any payment or payments made by it pursuant to the provisions hereof and such receipt shall be a full and sufficient discharge to the Trustee for such payment or payments.

10. The Settlor reserves to herself and at her death to her husband, Samuel James, if then living, the option to direct the Trustee in writing to issue voting proxies for and retain, sell, ex-

14 change, invest, reinvest, lease, mortgage, or improve any of the trust property held hereunder in such manner as she or he may so direct and without liability to the Trustee for resulting loss. Subject to the exercise of such option the Trustee during the continuance of the trust and until actual distribution of the property, shall have full authority in its discretion; to retain property coming into its hands in the same form as received by it and to hold, invest, and reinvest the trust fund from time to time held hereunder in such Government, State, and municipal bonds of any government, State, or municipality, that shall not have defaulted in payment previously to the date of execution of this trust; to borrow money for the benefit of the trust; to sell, lease, mortgage, pledge, improve, or exchange any property real or personal held hereunder for such price and upon such terms and conditions as may to it seem advisable; and to deal on behalf of the trust with any subsidiary or affiliate including The National City Company, without in-

crease of liability and as freely as though dealing with an independent third party. The Trustee in its discretion may purchase property from or lend money to the Settlor's estate with or without security and without liability for loss.

11. The Settlor reserves to herself the right to direct the Trustee in writing to keep or deposit for safekeeping any or all of the property from time to time held hereunder in such one or more of the Trustee's foreign branches or of the foreign offices or branches of any of its affiliates or in such foreign institution or institutions as she may direct but the Trustee shall be under no liability for loss resulting from compliance with such direction by the Settlor.

12. The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James, during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final; and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the Trustee shall not be substantially increased without its written consent.

13. The trust shall take effect upon acceptance by the Trustee and in all respects shall be governed by New York laws.

In witness whereof, the Settlor has hereunto set her hand and seal and the Trustee has caused these presents to be executed by its duly authorized officers and its corporate seal to be hereunto affixed as of the day and year first above written.

(Signature) GERTRUDE FELDMAN JAMES [L.S.]
CITY BANK FARMERS TRUST COMPANY,
By W. W. HOFFMAN.

Attest:
Asst. Secretary.

REPUBLIC OF FRANCE,
City of Paris, ss:

Be it remembered that on this fourteenth day of January 1930, at the city of Paris, aforesaid, before me G. A. Dixon, a commissioner of deeds for the State of New York in the said city of Paris, and there residing, personally came Gertrude Feldman James to me known to be the individual described in and who executed the within instrument and acknowledged to me that he executed the same.

In testimony whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

G. A. DIXON.

[SEAL]

STATE OF NEW YORK,
County of New York, ss:

On this 21st day of February 1930, before me personally came W. W. Hoffman, who being by me duly sworn said that he
17 resides in New York City that he is one of the vice presidents of the National City Bank of New York, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation, that the seal affixed to the said instrument is such corporate seal and was so affixed by authority of the board of directors of the said corporation, and that he signed his name thereto by like authority.

[SEAL]

HAROLD SWENSON,
Notary Public, Kings Co.

Exhibit B, to foregoing petition

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Apr. 7, 1933.

Address reply to Commissioner of Internal Revenue, and refer to MT-ET-Cl-NR-26147-SEM.

District of Second New York. Estate of Gertrude Feldman James. Date of death—May 20, 1931. City Bank Farmers Trust Company, trustee.

ESTATE OF GERTRUDE FELDMAN JAMES,
22 William Street, New York, New York.

18 SIRS: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of January 18, 1933. The deficiency in Federal estate tax hereby determined amounts to $11,840.03, and is fully explained in the attached statement, consisting of one page, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the collector of internal revenue, no claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to
19 file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed form 890, (1) waiving the restrictions on the assessment and collection of such deficiency and (2) consenting to the assessment and collection thereof, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

DAVID BURNET,
Commissioner.
By (Sgd.) R. M. ESTES,
R. M. Estes,
Deputy Commissioner.

Enclosures:

Statement.
Waiver—Form 890.

VRL

MT-ET-Cl-NR-26147-SEM-Second New York.
Estate of Gertrude Feldman James.

The protest relates to the inclusion of the several items described under schedule E of the return in the gross estate.

After due consideration it is determined that these items
20 are properly included in the gross estate as coming within the purview of section 302 (d) of the Revenue Act of 1926, therefore, the protest is overruled.

The final determination of the Bureau is shown in the following computation:

	Returned	Tentatively determined	Determined
Gross estate	$0.00	$383,500.00	$383,500.00
Deductions	0.00	0.00	0.00
Net estate	0.00	383,500.00	383,500.00
Gross tax	0.00	11,840.03	11,840.03
Credit for State estate, inheritance, legacy, or succession taxes	0.00	0.00	0.00
Net tax	0.00	11,840.03	11,840.03
Deficiency			11,840.03

21 Before United States Board of Tax Appeals

[Title omitted.]

Answer

The Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, general counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Denies so much of paragraph 1 of the petition as alleges that Gertrude Feldman James, deceased, as an alien of the United States and a resident and subject of the Kingdom of Great Britain. Admits all other allegations contained in paragraph 1 of the petition.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. (a), (b), and (c) Admits the allegations contained in
22 In re: Appeal, Estate of Gertrude Feldman James, No. 72522, paragraph 5 (a), (b), and (c) of the petition.

5. (d) and (e) Denies the allegations contained in paragraph 5 (d) and (e) of the petition.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is respectfully prayed that the determination of the Commissioner be approved

(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
LEWIS S. PENDLETON,
Special Attorney,
Bureau of Internal Revenue.

lms-7/18/33

23 Before United States Board of Tax Appeals

[Title omitted.]

Stipulation as to facts

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective counsel, that the following is a true and correct statement of the facts of this case, all of which facts are hereby admitted without proof and are to be deemed the facts of this case, and the exhibits referred to herein and annexed to the petition herein may be admitted and received in evidence without requiring the production of the originals, viz:

1. The petitioner herein, City Bank Farmers Trust Company, a corporation duly organized and existing under the laws of the State

of New York, has its principal place of business at No. 22 William Street, in the Borough of Manhattan, city, county, and State of New York, and is trustee of the trust hereinafter mentioned.

24 2. The said Gertrude Feldman James died on or about the 20th day of May 1931. At the time of her death she was a nonresident of the United States. By an agreement bearing date the 21st day of February 1930 said Gertrude Feldman James transferred certain property, described in a schedule thereto annexed, to said City Bank Farmers Trust Company, as trustee thereunder. A copy of said trust agreement is annexed to the petition herein and marked "Exhibit A."

3. The notice of deficiency, a copy of which is annexed to the petition herein and marked "Exhibit B", was mailed to said petitioner, City Bank Farmers Trust Company, on April 7, 1933, which date said notice bears.

4. The tax in controversy is the Federal estate tax upon the estate of said decedent, and the sum involved is $11,840.03.

5. By paragraph 12 of the agreement creating said trust, the decedent had a conditional right to modify, alter, or revoke the same, this right, however, being expressly conditioned upon the consent in writing of the trustee and of Samuel James, decedent's husband, during his life, and after his death, upon the consent in writing of the trustee and Frank Samuel James, the settler's brother-in-law.

6. Said Samuel James and Frank Samuel James both survived said Gertrude Feldman James and neither of them nor said City Bank Farmers Trust Company ever gave any consent to a revo-

25 cation or alteration of said trust or to a change of any beneficial interest therein.

7. The said trust was in full force and effect at the date of the death of said Gertryde Feldman James.

8. The only issue for adjudication herein is the question of whether the property constituting said trust fund and upon the transfer of which said tax was determined to be due by the respondent herein, was properly included as a part of the gross estate of said decedent.

Dated, this 13th day of October, 1933.

EDWARD W. CAMERON,
Counsel for Petitioners.

(Signed E. BARRETT PRETTYMAN,
Counsel for Respondent.

26 Before United States Board of Tax Appeals

[Title omitted.]

Affidavit of P. A. Miller

STATE OF NEW YORK,
County of New York, ss:

P. A. MILLER, being duly sworn, deposes and says, as follows: I am a trust officer of City Bank Farmers Trust Company, the

trustee of a trust created by Gertrude Feldman James by trust agreement dated February 21, 1930, and am in charge of the said trust in behalf of said trustee.

Both of the persons whose lives measure the trust survived said Gertrude Feldman James, and are now living to the best of my information and belief,

Neither Samuel James, Frank Samuel James nor City Bank Farmers Trust Company ever gave any consent to a revocation or alteration of said trust or to a change of any beneficial interest therein; nor was any such action ever attempted by said Gertrude Feldman James.

The said trust was in full force and effect at the date of death of said Gertrude Feldman James and is still in full force and effect.

P. A. MILLER.

Swern to before me this 13th day of October, 1933.

THOMAS I. FITZGERALD,
Notary Public, New York County.

N. Y. Co. Clk.'s No. 105, Reg. No. 5F314.
Commission expires March 30, 1935.

Before United States Board of Tax Appeals

Docket No. 72522

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, Deceased, Dated February 21, 1930, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Promulgated February 21, 1934

The decedent on February 21, 1930, conveyed certain property in trust, reserving to herself the income for life. The trust was revocable only with the consent of her husband, who was a bene-
28 ficiary. Held, that the property conveyed in trust is not includable in her gross estate.

Edward M. Cameron, Jr., Esq., and George H. Craven, Esq., for the petitioner.

L. S. Pendleton, Esq., for the respondent.

Opinion

SMITH: This proceeding involves a deficiency in the estate tax of Gertrude Feldman James, deceased, in the amount of $11,840.03. The only question at issue is whether the value of certain securities which the petitioner conveyed in trust prior to her decease was a part of her gross estate for estate tax purposes.

The essential facts have been stipulated. The decedent died a nonresident of the United States on May 20, 1931. Prior to her death and by a certain agreement bearing date of February 21, 1930, she transferred certain securities, consisting principally of stocks and bonds, to the City Bank Farmers Trust Co., as trustee, for the uses and purposes as follows:

1. To hold, invest, reinvest and keep the said trust property invested during the lives of Vera Nanette James, daughter of the Settlor and of Samuel James, husband of the Settlor, and Peggy Florence James, daughter of the Settlor and of the said Samuel James, that is, until the death of the survivor of the said Vera Nanette James and Peggy Florence James, said period being hereinafter designated as the "Trust period"; to collect the rents, issues, and profits thereof and to apply the income from said
29 trust property to and for the use of the Settlor until her death or until the termination of the trust period, whichever event shall first occur, and upon and after the death of the Settlor prior to the termination of the trust period, to hold the said trust property and apply the income thereof as follows:

A. To apply the income thereof to the use of the said Samuel James, husband of the Settlor, if then living, until his death or until the termination of the trust period, whichever event shall first occur, or, if not then living, or upon his death prior to the termination of the trust period, to divide the principal into so many equal shares that there shall be one for each child of the Settlor and of the said Samuel James then living and one for the descendants then living of a deceased child of the Settlor and of the said Samuel James and to dispose of the income and principal of said shares as follows:

(a) To apply the income of each share held for a child of the Settlor and of the said Samuel James to the use of such child until his or her death or until the termination of the trust period, whichever event shall first occur, and upon his or her death prior to the termination of the trust period, to pay over the principal of such share to such child's descendents and in such proportions as such child may have appointed by will and to pay over any part not effectively so appointed in equal parts per stirpes to his or her descend-
30 ants then living or if none, in equal parts per stirpes to the surviving children of the Settlor and of the said Samuel James and the descendants then living of a deceased child of the Settlor and of the said Samuel James or, if none be then living, to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

(b) To pay over the principal of a share set apart for the descendants of a deceased child, in equal parts per stirpes, to such descendants.

B. Upon the termination of the trust period, to pay over the principal of the trust fund to the said Samuel James, if then living, or if not, to the Settlor, if then living, or if not, to such beneficiaries

as shall then be receiving income according to the provisions of paragraph 1. A. (a) hereof, and in the same proportions as provided therein for the distribution of income, or if no such beneficiaries be then living, then to such persons as shall then constitute the heirs at law of the said Samuel James according to the laws of New York then governing the descent of real estate.

* * * * * * *

3. The Trustee may from time to time apply to the use of the Settlor's said husband and descendants or any of them, so much of the principal of the trust as in its discretion it may deem advisable for their proper education, care, comfort, support, or advancement in life.

* * * * * * *

31 12. The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided, however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James, during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose but the duties and liabilities of the Trustee shall not be substantially increased without its written consent.

The respondent has determined, as stated in his deficiency notice, that the value of the property so conveyed in trust is includable in the decedent's gross estate "as coming within the purview of section 302 (d) of the Revenue Act of 1926." The pertinent provisions of section 302 read as follows:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

32 (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.

Under the terms of the trust instrument the decedent retained a power to alter or revoke the trust, but only with the written consent of the trustee and of her husband, Samuel James, if living, or, if deceased, his brother, Frank Samuel James. The Supreme Court

has held, in Reinecke v. Northern Trust Co., 278 U. S. 339, that, where the grantor's right to alter or revoke the trust can be exercised only with the consent of one having a beneficial interest therein, the gift is complete and the property is not taxable in the grantor's estate for estate tax purposes. The court there said:

* * * He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

We have since held that Reinecke v. Northern Trust Co., su-
33 pra, which arose under the Revenue Act of 1921, is controlling in cases arising under the Revenue Acts of 1924 and 1926 and that the language "through the exercise of a power either by the decedent alone or in conjunction with any person, to alter, amend, or revoke" contained in section 302 (d) should be construed to mean "any person not a beneficiary of the trust." See Colonial Trust Co., et al., Executors, 22 B. T. A. 1377; Estate of Irving Lee Stone, et al., Executors, 26 B. T. A. 1; Carl F. Holmes, 27 B. T. A. 660; David J. Lit, et al., Executors, 28 B. T. A. 853, and cases therein cited. As to what constitutes a revocable trust under sections 166 and 167 of the Revenue Act of 1928, see Smith v. Commissioner, 59 Fed. (2d) 56; Bessie R. Jones, 27 B. T. A. 171; Iola Wise Stetson, 27 B. T. A. 173.

There can be no doubt that the decedent's husband, Samuel James, was a beneficiary of the trust in question. After the death of the grantor he was to receive the income from the trust for life or for the remaining term of the trust. The facts are that the grantor died in 1931 and that Samuel James has since received and is still receiving the entire trust income. Under clause 3 of the trust agreement above shown the trustee was authorized to apply so much of the principal of the trust fund as it deemed advisable to his, Samuel James', "care, comfort, support or advancement in life." Under clause B he was entitled upon the termination of the trust, if then living, to receive the entire principal of the trust fund.

It follows that the enjoyment of the trust property was not
34 subject at the time of the decedent's death to any change through the exercise of any power to alter or revoke within the meaning of section 302 (d) of the act.

We are of the opinion that the respondent erred in including the value of the trust property under consideration in the decedent's gross estate.

Reviewed by the Board.

Judgment will be entered for the petitioner.

Before United States Board of Tax Appeals, Washington

Docket No. 72522

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, deceased, dated February 21, 1930, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated February 21, 1934, it is

35 Ordered and decided that there is no deficiency in estate tax. Enter,

(Signed) CHARLES P. SIMON,
Member.

In United States Circuit Court of Appeals for the Second Circuit
[Title omitted.]

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal
36 Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, general counsel, Bureau of Internal Revenue, and Lewis S. Pendleton, special attorney, Bureau of Internal Revenue, and respectfully shows:

I

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is a corporation duly organized and existing under the laws of the State of New York with its principal place of business at no. 22 William Street, in the Borough of Manhattan, city, county, and State of New York, and is trustee of the trust hereinafter mentioned. The Federal estate tax return for the estate of Gertrude Feldman James, deceased, was filed by the taxpayer in the office of the collector of internal revenue for the second district of New York, customhouse, New York, New York.

That the court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

The nature of the controversy is as follows, to wit: On February 21, 1930, Gertrude Feldman James (hereinafter referred to
37 as the decedent) executed an instrument in writing whereby she transferred certain securities to the taxpayer to be held in trust until the death of the survivor of her two daughters. During the continuance of the trust the income was to be paid to the decedent for life and after her death to her husband, Samuel James, if then living for the duration of his life and after his death to their then living children and to the then living descendants of any deceased child. Upon the termination of the trust period, that is to say, upon the death of the survivor of the two daughters, the trustee was directed to pay over the principal of the fund to the husband, if then living, for the duration of his life and after his death to such beneficiaries as should then be receiving the income. The trust also provided that the decedent should have the right at any time during her life to modify, alter, or revoke the agreement with the consent of the trustee and of her husband.

The decedent died on May 20, 1931. The taxpayer, as trustee of the above-mentioned trust, filed a Federal estate tax return wherein it disclosed, but did not include for tax, the securities transferred under the aforesaid trust agreement. In determining the Federal estate tax on the decedent's estate, the Commissioner included in the gross estate the sum of $383,500.00 representing the value on the date of death of the securities transferred in trust. As the result of this adjustment the Commissioner notified the taxpayer that there was a deficiency proposed for assessment against it of $11,-840.03. The taxpayer filed a petition with the United States
38 Board of Tax Appeals and in due course a hearing was had. On February 21, 1934, the Board promulgated its opinion holding that the Commissioner had erred in including the value of the trust property in the decedent's gross estate and on February 27, 1934, entered its decision determining that there was no deficiency in estate tax.

III

The Commissioner's assignments of error are as follows:

1. The Board of Tax Appeals erred in determining that $383,-500.00, representing the value of the securities transferred to the taxpayer under the trust agreement dated February 21, 1930, should be excluded from the gross estate.

2. The Board of Tax Appeals erred in failing and refusing to find that the transfer of said securities was intended to take effect in possession or enjoyment at or after death within the meaning of secion 302 (c) of the Revenue Act of 1926.

3. The Board of Tax Appeals erred in failing and refusing to find that the enjoyment of said securities was subject to change at the date of the decedent's death through the exercise of a power either by the decedent alone or in conjunction with any person to

alter, amend, or revoke the meaning of section 302 (d) of the Revenue Act of 1926.

4. The Board of Tax Appeals erred in determining that there was no deficiency in estate tax.

39 5. The Board of Tax Appeals erred in failing and refusing to determine that there was a deficiency in estate tax due from said taxpayer of $11,840.03.

Therefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

(Signed) FRANK J. WIDEMAN,
Assistant Attorney General.
(Signed) ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Of counsel:
(Signed) LEWIS S. PENDLETON,
Special Attorney,
Bureau of Internal Revenue.

40 [*Duly sworn to by Lewis A. Pendleton, jurat omitted in printing.*]

41 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Notice of filing petition for review

To CITY BANK FARMERS TRUST COMPANY,
No. 22 William Street, New York, New York.
EDWARD M. CAMERON, JR., Esq.,
20 Exchange Place, New York, New York

You are hereby notified that the Commissioner of Internal Revenue did, on the 5th day of May, 1934, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition

42 for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 5th day of May, 1934.

(Signed) ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10th day of May, 1934.

CITY BANK FARMERS TRUST CO.,
Trustee,

(Signed) P. F. MILLER, *Trust Officer,*
Respondent on Review.

(Signed) EDWARD M. CAMERON,
Attorney for Respondent on Review.

43 In the United States Circuit Court of Appeals, for the Second Circuit

[Title omitted.]

Praecipe for record

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connections with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

44 2. Pleadings before the Board:

(a) Petition, omitting schedule A (list of securities) from exhibit A.

(b) Answer.

3. Stipulation of facts.

4. Opinion and decision of the Board.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel,
For the Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 18th day of June, 1934.

(Signed) EDWARD M. CAMERON, JR.,
Attorney for Respondent.

45 [Clerk's certificate to foregoing transcript omitted in printing.]

46 In United States Circuit Court of Appeals, for the second Circuit

[Title omitted.]

Stipulation and addition to record

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled case that the schedule hereto annexed is a true and correct copy of schedule A which was referred to and attached to the trust agreement marked "Exhibit A Annexed to Foregoing Petition" appearing on pages 8 to 17 of the printed transcript of record in the above-entitled case; that the annexed schedule, as part of said trust agreement, was a part of the record in said case before the Board of Tax Appeals, and that said schedule and this stipulation may be filed as a part of the
47 record in the above-entitled case in the United States Circuit Court of Appeals for the Second Circuit.

Dated, November 8, 1934.

FRANK J. WIDEMAN,
Assistant Attorney General,
Counsel for Petitioner.
EDWARD M. CAMERON, JR.,
Counsel for Respondent.

So Ordered:
MANTON,
U. S. C. J.

Schedule A

$20,000 City of Brisbane, 5% Sinking Fund Gold Bonds, March 1, 1957.
$25,000 Kingdom of Norway, 5% External Sinking Fund Gold Bonds, March 15, 1933/63.
$24,000 Republic of Colombia, 6% External Sinking Fund Gold Bonds, Oct. 1, 1928/61.
$1,500 Mortgage Bank of Chile, 6% Guaranteed Sinking Fund Gold Bonds, Apl. 30, 1928/61.
$20,000 United States Brazil 6½% External Gold 'onds, October 1, 1957.
$5,000 Nord Railway Co. 6½% External Sinking Fund Gold Bonds, Oct. 1, 1950.
$4,000 Peruvian National Loan, 6% External Sinking Fund Gold 'onds, Oct. 1, 1961.
$10,000 Paris Orleans Railroad Co., 5½% External Sinking Fund Gold Bonds, March 1, 1968.
48 $10,000 Dominican Republic Customs Administration, 5½% 20 year Sinking Fund Gold Bonds, March 1, 1942.
$19,500 Republic of Cuba, 5½% External Sinking Fund Gold Bonds, Jan. 15, 1953.
$7,000 Oriental Development Co., Ltd., 6½% External Gold Debentures, Nov. 1, 1958.
$5,000 Oriental Development Co., Ltd., 6% External Gold Debentures, March 15, 1953.

$15,000 Berlin Electric Elevated & Underground Railways, 6½% Gold Bonds, Oct. 1, 1956.
$20,000 City of Vienna, 6% External Sinking Fund Gold Bonds, Nov. 1, 1952.
$5,000 United States of Brazil, 6½% External Sinking Fund Bonds, Oct. 15, 1957.
$5,000 City of Milan, 6½% External 1927 Loan, Sinking Fund Gold Bonds, Apl. 1, 1952.
$1,000 Kingdom of Belgium, 7% External Sinking Fund Gold Gold Bonds, Oct. 1, 1956.
$20,000 Finnish Guaranteed Municipalities Loan of 1924, 6½% External Sinking Fund Gold Bonds, October 1, 1954.
$30,000 Canadian Pacific Rly. Co., 4½% Collateral Trust Gold Bonds of Sep. 1, 1946.
$5,000 Government of Argentine, 6% External Sinking Fund Gold Bonds, Oct. 1, 1960.
$10,000 Republic of Peru, 7% secured Sinking Fund Gold Bonds, Sept. 1, 1959.
$24,000 Kingdom of Italy, 7% External Sinking Fund Gold Bonds, December 1, 1951.
$20,000 Mortgage Bank of Chile, 6¾% Guaranteed Sinking Fund Gold Bonds, June 30, 1961.
$10,000 Dominion of Canada, 4½%, February 1, 1946.

49 *Stipulation*

$8,000 St. Maurice Valley Corporation, 1st & Coll. A, 6% Bonds, Dec. 1, 1945.
$10,000 State loan of Kingdom of Hungary, 7½% Sinking Fund Gold Bonds, Feb. 1, 1944.
$23,000 Govt. of Argentine, 6% Sinking Fund Gold Bonds (External), Dec. 1, 1959.
$15,000 Govt. of Japan, 6½% Sinking Fund Gold Bonds, Feb. 1, 1954.
$22,000 Commonwealth of Australia, 5% External Gold Bonds, July 15, 1955.
$20,000 Republic of Haiti, Customs & General Reserves, 6% S. F. Gold Bonds, Oct. 1, 1952 (Series A).
$5,000 Republic of Haiti, Customs & General Reserves, 6% Sinking Fund Gold Bonds, October 1, 1953 (Series C).
$2,000 Government of Sweden, 5½% Gold Bonds, November 1, 1954.
$9,500 Paris Lyon Mediterranean Rly. Co., 6% External Sinking Fund Gold Bonds, August 15, 1958.
$36,000 Dominion of Canada, 5% Refunding Gold Bonds, May 1, 1952.
$10,000 State of Sao Paulo (External Water Works loan of 1926), 7% secured Sinking Fund Gold Bonds, September 1, 1956.
$6,000 Canadian Pacific Rly. Co., 4% Perpetual Consolidated Debenture Stock.

50 In United States Circuit Court of Appeals for the Second Circuit

No. 114. October term, 1934

Argued Nov. 21, 1934. Decided Dec. 17, 1934

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, Deceased, respondent

Appeal from the Board of Tax Appeals

Before MANTON L. HAND, and SWAN, Circuit Judges

Petition to review a decision of the United States Board of Tax Appeals (29 B. T. A. 1141.) Petitioner appeals. Affirmed.

Frank J. Wideman, Asst. Atty. Gen., and Sewall Key and Helen R. Carloss, Sp. Assts. to Atty Gen., for petitioner.

Taylor, Blanc, Capron & Marsh, and Edward M. Cameron, Jr., all of New York City (Russell L. Bradford and George H. Craven, both of New York City, of counsel), for respondent.

Opinion

MANTON, Circuit Judge:

This petition presents the question of whether a deficiency in Federal estate tax is due from the Trustee named in a trust agreement made by Gertrude Feldman James, now deceased. The Board of Tax Appeals decided against the Commissioner (29 B. T. A. 1141), and he petitions for a review. Sections 1001–1003 of the Revenue Act of 1926, 44 Stat. 9, c. 27, and section 1001 (a), as amended by section 1101 (a) of the Revenue Act of 1932, 47 Stat. 169, c. 209 (26 U. S. C. A., §§ 1224–1226.)

The petitioner's claim is that the corpus of the trust created by the decedent in 1930 should be included in her gross estate for taxation. Section 302 (c) or (d) of the Revenue Act of 1926, 44 Stat. 9, c. 27 (26 U. S. C. A., §§ 1094 (c, d).

Gertrude Feldman James, a nonresident of the United States, died May 20, 1931, after she had transferred on February 21, 1930, certain foreign securities in trust for certain purposes during the lifetime of her two daughters, or the survivor of them. The income of the trust was to be paid to her for life or until the termination of a trust, whichever occurred first. If she died before such termination, the income was to be paid to her husband, Samuel James, so long as he lived, or until the termination of the trust. If he died prior to the termination of the trust, the principal was to be divided into as many shares as there were children of the grantor and Samuel James then living, plus one share for the descendants then

living of any deceased child. The income of each share was to be applied to the use of such child during his life or until the end of the trust, whichever should occur first, and upon his death prior to the termination of the trust the principal was to be paid to his descendants in such proportions as he had appointed by will, and any part not so appointed was to be paid to his descendants, if living, in equal parts per stirpes and not per capita. If no descendants of such child were living at that time, the principal was to be paid in equal parts per stirpes and not per capita to the surviving children of the settler and Samuel James and the descendants of any deceased
51 child, or, if none were living, to such persons as should then constitute the heirs at law of Samuel James, according to the laws of New York then governing the descent of real estate. Upon the termination of the trust, the principal was to be paid to Samuel James, if then living; if not, to the Settlor if then living, or, if not, to such beneficiaries as were then receiving the income as outlined, in the same proportion, or, if no such beneficiaries were then living, to the heirs of Samuel James according to the laws of New York governing the descent of real estate.

Paragraph 12 provided:

"The Settlor shall have the right, at any time, and from time to time during her life, by an instrument or instruments in writing delivered to the Trustee to modify, alter, or revoke this agreement in whole or in part, or to change any beneficial interest hereunder, provided, however, that no such revocation, alteration, or change of beneficial interest shall be effected without the consent in writing of the Trustee and of the said Samuel James during his life and, after his death, of the Trustee and of Frank Samuel James, brother of the said Samuel James during his life and in case of disagreement between the Settlor and the City Bank Farmers Trust Company, then the decision of the said Samuel James or Frank Samuel James, as the case may be, shall be final and the Settlor reserves to herself the right to increase this trust by delivering property or making insurance policies payable to the Trustee for that purpose, but the duties and liabilities of the trustee shall not be substantially increased without its written consent."

When the Settlor died, May 20, 1931, her husband survived.

Thus, under the provisions of this trust, the interest of Samuel James was the income for life, after the death of the Settlor, with right to the corpus whenever the trust terminated. Moreover, there was a discretion placed in the trustees at any time during the term of the trust to use for his support, care, comfort, and advancement in life any part of the principal of the trust as the trustees saw fit. In any case, the term of the trust was the lives of the two daughters, or the survivor of them. The power to revoke was a limitation of the benefits to be given to the children under the trust. The Settlor's death removed these limitations since the possibility of revocation then terminated, and the trust would continue during their lives, if they survived their father, Samuel James. If not,

their father Samuel James received the principal. The Settlor's will to preserve the limitations ended with her death. The economic benefit would pass to the children if and when they survived their father by her death, providing the corpus was not used, as permissible, for Samuel James' "care, comfort, support or advancement in life." Her death would then become the generating source within the authorities. Tyler v. United States, 281 U. S. 497, 50 S. Ct. 356, 74 L. Ed. 991, 69 A. L. R. 758.

Section 302 (d) of the Revenue Act 1926 (26 U. S. C. A., § 1094 (d) requires that there shall be included in the decedent's gross estate the value of any property of which the decedent has at any time made a transfer by trust, where the enjoyment was subject, at the date of death, to any change through the exercise of a power either in the decedent alone "or in conjunction with any person" to alter, amend or revoke the trust. While the decedent in her trust reserved the right to revoke or modify the trust in conjunction with her husband, if living, and the trustee, and after the husband's death, in conjunction with the trustee and her husband's brother, still, if the trust were terminated, the corpus passed to the husband if living and to the children if he were not living. The statute is clear and comprehensive. It is sufficient if there is a power in the grantor to alter or amend the trust even if the Settlor may make no change for his benefit. Porter v. Commissioner, 288 U. S. 436, 53 S. Ct. 451, 77 L. Ed. 880.

We have held that a provision in the trust agreement for a trustee's consent to a revocation did not void the tax. Witherbee v. Commissioner (C. C. A.), 70 F. (2d) 696. But the Supreme Court held in Reinecke v. Northern Trust Co., 278 U. S. 399, 49 S. Ct. 123, 125, 73 L. Ed. 410, 66 A. L. R. 397, that, where the Settlor established two trusts in which he reserved a power of revocation to himself alone, the value of such trusts should be included in the decedent's gross estate for tax purposes, but that in five trusts where revocation was reserved to the Settlor only with the consent of some beneficiary, the corpus of such trusts were not to be included within the decedent's estate, for taxation purposes. The reason given by the court was that the Settlor could effect no change in the
52 beneficial interests in the trust without the consent of the beneficiary, and the court said:

"Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute. * * * The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax."

See, also, Lit v. Commissioner (C. C. A.) 72 F. (2d) 551.

And in Reinecke v. Smith, 289 U. S. 172, 53 S. Ct. 570, 572, 77 L. Ed. 1109, the rule announced in the Northern Trust Co. case, supra, was again affirmed, the court saying:

"The tax was upheld as applied to the corpus of trust over which the grantor had sole power of revocation. It was, however, condemned as to those where revocation was dependent upon joint action of the grantor and the beneficiary, for the reason that the interest of the beneficiary was adverse and the grantor unable at will to alter or destroy the trust."

Settlor's husband was entitled to receive the income of the trust fund after her death, and, having survived the decedent, he received the full income. Thus his right to receive the full trust income was a beneficial and adverse interest. And upon the termination of the trust, regardless of whether or not the settlor should then be living, the corpus was payable to her husband. Other provisions, without limitation as to time, applied to the use by the husband of as much of the principal as might be deemed advisable for his care, comfort, and support. The interest of the husband in the principal was in no way contingent. Section 40, N. Y. Real Property Law (Consol. Laws, c. 50), provides that a future estate is vested when there is a person in being, who would have an immediate right to possession of the property, on the determination of all the intermediate or precedent estates. Moore v. Littel, 41 N. Y. 66; Matter of Barstow, 230 App. Div. 371, 244 N. Y. S. 588, affirmed 256 N. Y. 649, 177 N. E. 177.

As to the husband's interests, they were vested and adverse to the Settlor's. The control over the disposition of such of the trust property as might be measured as belonging to him, and its economic benefits, were not left in the hands of the settlor. "The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made." Reinecke v. Northern Trust Co., supra.

Nor was this transfer in contemplation of death within the provisions of section 302 (c) of the Revenue Act 1926 (26 U. S. C. A. § 1094 (c). The husband's property did not pass from the control, possession, or enjoyment of the Settlor at her death. The transfer was made not in contemplation of her death, but long prior to her death, without any reserve power of control over her husband's interests or the disposition thereof. Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772; Hoeper v. Tax Commissioner of Wisconsin, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. 248. As to the husband's interest, it cannot be said that the death of the settlor was the generating source from which authority to impose taxes takes its being, and "it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." Tyler v. United States, 281 U. S. 502, 50 S. Ct. 356, 358, 74 L. Ed. 991, 69 A. L. R. 758. The statute (section 302 (c) does not in terms relate to transfers in title at the time of death. The

reserving of income which is ended at death is not a transfer intended to take effect in possession or enjoyment at or after death. Helvering v. Duke, 290 U. S. 591, 54 S. Ct. 95, 78 L. Ed. 521; May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244; Commissioner v. Wallace (C. C. A.) 71 F. 1002.

In Lit v. Commissioner (C. C. A.) 72 F. (2d) 551, the Settlor established a trust to last for the lives of his wife and himself or the survivor. The Trustee was to pay the income of the trust to the wife for life and at her death to pay the income to the Settlor for life (him surviving). At the death of the survivor, the Trustee was to pay the corpus of the trust to the son. There were further provisions if the son were dead. The Settlor died leaving his wife and son surviving. The Settlor had reserved the power
53 to revoke with the consent of his wife. The Circuit Court of Appeals expressed itself as being in "entire accord with the reasoning and conclusions" set out in the decision of the Board of Tax Appeals (28 B. T. A. 853). The Board said that "any person" as used in section 302 (d) is not to be given a literal interpretation, but is to be read "any person not a beneficiary of the trust." It was held that the value of the wife's life estate could not be taxed since her interest was adverse and she had to consent to revocation. But the son's remainder interest was held to be taxable and to be included as part of the decedent's gross estate. The Settlor's power to revoke the remainder interest was not dependent upon securing the remainderman's consent. All the Settlor had to do was revoke in conjunction with his wife who had no adverse interest as to the remainder.

Therefore we conclude that Samuel James had an adverse interest and that, as to his interests in the trust fund, they could not be taxed under the statute. Nor do we think that the interests of their two daughters in the trust fund might be calculated and included as part of the corpus of the Settlor's gross estate.

While no one with an adverse interest could prevent the Settlor from exercising her will to the extent of altering or revoking the interests to be transferred to her daughters as created by the trust, and while until her death she had the power to destroy her daughters' interests, which were contingent on her continuing the will which created them, still in view of the permissible use of the entire corpus for the "care, comfort, support or advancement in life" of her husband and the right to use any or all of it at any time during his lifetime, it may well be that the daughters would never become entitled to any of the corpus of the trust. This uncertainty would render it unjust to tax the interest of the daughters so contingent. The death of the Settlor cannot be said to be the generating source of the children's interests. Tyler v. United States, supra. It may not be said that at the Settlor's death the contingency upon which those interests were based ended. It did not end because of the permissibility, at all times during the life of Samuel James, to use all of the corpus if conditions and circumstances reasonably required the

trustees to act in furtherance of the clause of granting "care, comfort, support or advancement in life" to Samuel James. It is only the creation of new interests, brought into being by the death of the Settlor, which may be properly taxed for a death duty.

We therefore conclude that no tax may be imposed and that the corpus of this trust fund may not be included in the gross estate of the Settlor for death taxes.

Order affirmed.

L. HAND, Circuit Judge, dissenting with opinion.

54 In United States Circuit Court of Appeals For the Second Circuit

No. 114. October term, 1934

Argued Nov. 21, 1934. Decided Dec. 17, 1934

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CITY BANK FARMERS' TRUST COMPANY, AS TRUSTEE UNDER AN AGREEMENT with Gertrude Feldman James, Deceased, respondent

Appeal from the Board of Tax Appeals

Before MANTON, L. HAND, and SWAN, Circuit Judges

Dissenting opinion

L. HAND, Circuit Judge (dissenting):

It is not possible, I think, to read section 302 (d) of the Revenue Act of 1926 (26 U. S. C. A., § 1094 (d)), as the Board read it in Lit v. Commissioner, 28 B. T. A. 853; and as the Third Circuit did in the same case on appeal, 72 F. (2d) 551. The contrast between it and section 219 (g) of the act (26 U. S. C. A., § 960 note) is too strong an indication that Congress meant in each section exactly what it said; section 302 (d) covers powers whose exercise is conditional on the approval of the beneficiary, as well as of any one else. The statement in the committee reports (House Report 179; Senate Report 398), that section 302 (d) "is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust", refers only to the general policy of each section, and does not make the scope of each identical. We cannot escape deciding how far section 32 (d) is constitutional, taken literally. I must own that I might have thought that it was entirely so, if confined to gifts made after 1926. A tax upon a gift is an excise and within the competence of Congress. Bromley v. McCaughn, 280 U. S. 124, 50 S. Ct. 46, 74 L. Ed. 226. I cannot conceive that it should make any difference what name is given to it; whether it

is classed as testamentary or inter vivos. Of couse its incidence is very different in each case; in the first the legatees bear it, in the second, the donees. Moreover if an estate tax, the value of the gift at the Settlor's death is added to his other property, and the legatees must pay not only upon the sum of both, but often at a higher rate; the tax might conceivably eat up the whole testamentary estate. Yet still I might not have found in all this anything objectionable under the fourteenth amendment. Donees and legatees are both mere volunteers, objects of the Settlor's bounty; they have not the slightest claim to equality of treatment from him, and, the gift being by hypothesis made with full knowledge of the law, I should think that its incidence might be taken as deliberately intended.

Therefore, even without any reserved power I might have thought section 302 (d) valid. In that I should however have been altogether wrong because of Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772. As to the equitable interests of the children, the addition of the power does make it valid, although the power was not absolute; but required the concurrence of two others, the husband and the Trustee. In the case of some conditions we could say with certainty when the power did or did not exist; for example the condition might be that the income from the gift must fall to two percent or less; in that case no power would ever exist, unless before the Settlor's death the income did fall so low. If it never did, the case would be throughout like Heiner v. Donnan, supra, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772. But in the case at bar the condition continued unascertainable for as long as the settlor lived
55 because no one could say, out of all the possible substitutes she might propose, that she could not persuade her husband and the Trustee to go along with any one. I think that is is on the taxpayer to meet this and show that the husband and the Trustee would never have concurred in any revocation the Settlor might make; otherwise the power was at least formally outstanding and her death was necessary finally to root the limitations beyond displacement. This is as I read Reinecke v. Smith, 289 U. S. 172, 53 S. Ct. 570, 77 L. Ed. 1109, and Witherbee v. Commissioner, 70 F. (2d) 696 (C. C. A. 2). Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, was different; there were no such powers, and no such statute.

Therefore, the interests not limited to the husband may be taxed, just as the Third Circuit held in Lit v. Commissioner, supra, 72 F. (2d) 551. However, the husband's own interests, disregarding that dependent on the Trustee's discretion, are no different from what they would have been, had the Settlor's power been wholly omitted. Under section 23 of the New York Personal Property Law (Consol. Laws, c. 41), just as in equity, the Settlor and the beneficiary might at any time have united to end his interest. So far Heiner V. Donnan, supra, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772, rules, and section 302 (d) is unconstitutional. There remains only his interest in the corpus, which the Trustees might take from his

children and give to him. Such an interest is not vested, even in the sense in which that word is used in New York, for it does not succeed upon the termination of the preceding estate. Moore v. Littel, 41 N. Y. 66. True, a contingent remainder is taxable if the testator's death ends the contingency (Klein v. U. S., 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996); but the same does not necessarily follow if it does not then end, as here. The question is therefore as to the person who must forecast an unpredictable event. My brothers think that the burden of proof should be upon the Treasury to show that the Trustee will not exercise its power, and that as that remains uncertain, there can be no tax. We do indeed recognize some juridical augurs, actuaries among others; and it is for this reason that we can conventionally apportion between the husband and the children the value of the res' here in suit, though nobody can tell which will in fact die first. But though we do effect such a prediction, we require some statistical background before we will, and there are no statistics as to a trustee's giving the principal of a fund to a life owner. In such a dilemma I think we should ignore the unascertainable possibility and treat the children's remainders as finally vested, just as we should ignore the unpredictable conditions on the Settlor's power to revoke. In each case there is a formally granted interest whose chances of displacement could not be calculated; in each we should ignore the possibility. I am quite aware that this is all largely matter of words, but so is much of the law of property; and unless we treat such formal distinctions as real, that law will melt away and leave not a rack behind. I would therefore add to the Settlor's testamentary estate the entire value of the gift, less the actuarial value of the husband's interests.

56 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CITY BANK FARMERS TRUST COMPANY AS TRUSTEE, ETC., RESPONDENT

Judgment

Filed Dec. 24, 1934

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

57 [File endorsement omitted.]

58 [Clerk's certificate to foregoing transcript omitted in printing.]

59 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File no. 39,433. U. S. Circuit Court of Appeals, Second Circuit. Term no. 10. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. City Bank Farmers Trust Company, as trustee under an agreement with Gertrude Feldman James, deceased. Petition for a writ of certiorari and exhibit thereto. Filed March 23, 1935. File no. 10 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE, 1935